SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 964

IN THE MATTER OF ROBERT MICHAEL, A GRAND JURY WITNESS,

Petitioner

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL BRIEF ON BEHALF OF PETITIONER FOR ARGUMENT ON MERITS

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Statement

The purpose in submitting this brief as a supplement to the brief heretofore filed in support of the Petition for Writ of Certiorari is in order to stress and confine petitioner's argument principally to the crux of his case, which is contained in the following question.

May a witness before a Grand Jury be adjudged in contempt of court on the ground that he committed perjury before the Grand Jury, where there is no evidence of obstruction of justice other than that inherent in perjury itself?

In as much as statements concerning the opinions below, the jurisdiction of the court, the statement of the case, and the specification of errors, have been set forth in the brief accompanying the Petition (pp. 7, 8) they will not be repeated here.

Argument

There appears no better way to open this argument concerning the question involved than to refer to the dissenting opinion of Ganey; District Judge, wherein (R. 134) he states:

> "The question here posed, while seemingly a simple one, has deeper implications and greater significance beyond the immediate case, for as a precedent, it will broaden the field of judicial power in criminal contempt cases beyond its present limitations, and in so doing is portentous of a growing tendency through attrition to wear away the ancient instrument of fact finding—trial by jury."

Likewise, in the case of *United States* v. *Arbuckle*, 48 Fed. Supp. 537, (1943) Laws, Justice of the District Court, called upon to decide whether the Court had jurisdiction to summarily punish certain witnesses for giving false testimony, stated in his opinion (p. 537):

> "The Court must squarely decide the question of its jurisdiction to act, without regard to its own wishes or those of counsel. Where witnesses wilfully have given false testimony in open court, they should be dealt with promptly and severely. The deterrent force of punishment is loss by delay. Respect for the Courts will not be maintained if witnesses are permitted to give false testimony without both challenge and punishment. But there is another point of view, emphasized by the Supreme Court of the United States, that a judge has no power to punish for contempt by reason of false testimony alone, otherwise he would be in a position to force his will upon witnesses and control their testimony. To use its exact words, the Court said: 'Thus it would come to pass that a potentiality of oppression and wrong would result and the freedom of the citizen when called as a witness in a court would be gravely imperiled.' Ex Parte Hudgings, 249 U. S. 378, 384, 39 S. Ct. 337, 340, 63 L. Ed. 656, 659, 11 A. L. R. 333. In this case, the rule was laid down to be that in

a case of perjury committed in open Court, the judge may not punish for contempt, unless, in addition to the perjury, there clearly appears 'the further element of obstruction to the court in the performance of its duty'. The Court mentioned that other courts had decided to the contrary, but pointed out that these courts mistakenly had attributed 'a necessarily inherent obstructive effect to false swearing'. This seems to require a definition of what is meant by the term 'obstructive effect', for it is certain that in every perjury case the false testimony tends to obstruct justice. In most instances, if not in all, it has the further effect of imposing burdens on the court and counsel, inasmuch as it requires extensive cross-examination, refuting evidence, expense and delay. But these effects have been held not to constitute the 'obstruction to the court in the performance of its duty' referred to by the Supreme Court. *State* v. *Meese*, 200 Wis. 454, 460, 225 N. W. 746, 229 N. W. 31. What, then, is perjury having the 'obstructive effect' to which the Supreme Court referred? A study of the decided cases which bear on this point seems to establish that it is 'perjury which blocks the inquiry'. This is the definition given by Hand, J., in *United States* v. *Appel*, D. C. 211 F. 495, a case referred to by the Supreme Court in its Hudgings' decision, as illustrating its view. If false testimony given in a case results in defiance of the Court or in frustration of its right to obtain testimony, then the witness in legal effect is contumacious, he is a contemnor, as well as a perjurer, and may be punished for contempt. But if the witness fully gives testimony, and in so doing testifies falsely, not in order to prevent the inquiry, but only in order to deceive, there is no contumacity, no blocking of the inquiry, and the remedy is solely by indictment for perjury and trial by jury.''

It is impossible to reconcile the reliance of the Circuit Court in the instant case on the *Arbuckle* case, *supra*, in view of the conclusion of the Circuit Court that,

> "He was not contumacious or obstreperous. He did not refuse to answer questions. His testimony cannot be fairly characterized as unresponsive in failing to give direct answers to the questions asked him." (R. 131)

The same Court in its opinion then recognizes the proposition that:

> '"Perjury by a witness has been thought to be not enough where the obstruction to judicial power is only that inherent in the wrong of testifying falsely."' (R. 132)

The opinion then erroneously concludes:

> "If he denies knowledge of something which it is determined beyond a reasonable doubt that he does know about he is blocking the inquiry just as effectively by giving a false answer as refusing to give any at all." (R. 133)

We submit that such a contention is the equivalent of the Court finding that perjury per se amounts to a criminal contempt subjecting the perjurer to summary conviction, even though there was no evidence to sustain a finding that the alleged false testimony resulted in defiance of the Court or in frustration of its right to obtain testimony.

The result of the Circuit Court of Appeals' opinion is to enlarge the field of judicial power in criminal contempt cases beyond its present limitations.

The dissenting opinion of Ganey, J. (R. 136), in commenting on the majority opinion states:

> "Does the evidence in this case support the findings of the Trial Court? I think not. I agree with the findings of the majority that the defendant was not contumacious or obstreperous, that he did not refuse to answer questions, and further that his testimony cannot fairly be characterized as evasive in failing to give

> direct answers to the questions asked him, nor can it be said that his answers were not responsive. That he did not tell the truth in many instances, I am convinced. However, it is now well settled that a mere act of perjury on the part of a witness does not in and of itself, without something more, amount to contempt of court. *Ex Parte Hudgings*, 249 U. S. 378."

Under the constitutional system prevailing in this country, no civilian can legally be deprived of his liberty except after an indictment by a grand jury and a trial by a jury of twelve of his peers, except in those cases of contempt of court where summary action against a witness is necessary to prevent what amounts to an actual obstruction of the processes of justice. There is a discussion of this in a concurring opinion filed in the contempt case of the *Penn Anthracite Mining Co.* v. *Anthracite Miners of Pennsylvania*, 318 Pa. 401 (1935) at page 421. In that case the present Attorney General of the United States successfully maintained before the Supreme Court of Pennsylvania that the Pennsylvania Act of June 23, 1931, P. L. 925 which required a trial by jury of persons accused of contempt of court for acts not committed in the presence of the court was *not* in violation of the Constitution of Pennsylvania. In his concurring opinion in that case at page 419, Mr. Justice Maxey, the present Chief Justice of Pennsylvania, said: "Trial by jury is the corner-stone of our administration of justice." He quoted Blackstone's criticism of trials before a court of admiralty without a jury, as being "contrary to the genius of the law of England." The concurring opinion (p. 421) further says in a footnote:

> "Summary proceedings against those who commit contempt in the face of the court are based on compelling reasons. A judge while performing his duties has to repress disorder in or near the court room and overcome defiance of his authority by counsel or witnesses,

so that the court's business may proceed. He is in the position of an individual who while on a lawful journey finds his pathway unlawfully obstructed; he can use appropriate means to overcome aggressions. But when a judge's orders are disobeyed, as here, at a distance from the court room and by criminal acts, these acts become an affront to society and punishment rests with society. Both judges and individuals possess the right of self-defense, but punitive measures after an aggression is completed should not be left with him against whom the aggression was directed."

The view thus expressed is in its rationale in complete accord with what Justice Cardozo said in *Clark v. U. S.*, 289 U. S. 1 (1932), and with what Chief Justice White said in *Ex parte Hudgings*, 249 U. S. 378 (1919), and with what Judge Learned Hand said in *U. S. v. Appel*, 211 Fed. Rep. 495 (1913), already cited in this brief. The basic idea in all these judicial utterances is that to constitute contempt of court there must be such an "obstruction to judicial power" that the court's business cannot proceed until the obstruction is removed by summary action. According to Justice Cardozo, Chief Justice White and Judge Hand perjury by a witness is *not* such an obstruction.

In respect to the conviction and imprisonment of this petitioner, after a trial before a judge but without a jury, these three propositions are respectfully submitted to the Court. First, such a conviction and imprisonment is a *negation* of the doctrine consistently maintained by this Court that a witness' false testimony in order to constitute that "obstruction of justice" which may be summarily adjudged "contempt of court" must be so manifest that it can be determined beyond a doubt by the mere inspection of his answers that the witness knew that his testimony would not be credited and did not intend that it should be. When the witness' perjury can be established only by aid of the

testimony of other witnesses, in extrinsic proceedings, and he is to be tried, he is entitled to his constitutional right to trial *by jury*. This right to trial by jury includes the right to have his case first heard by a grand jury.

Second, the action of the court below in enlarging the field of judicial power in summary convictions is a *reversal* of the tendency which has been manifested in this country for over a century in both legislation and in judicial decisions to protect the individual against arbitrary and summary convictions by a judge acting without a jury. The power of Federal courts to punish for contempts was limited and defined by the Act of Congress of March 2, 1831, 4 Stat. at Large 487. This Act resulted from what the statesmen of that time considered an unjust and arbitrary action on the part of Judge Peck of the District Court in disbarring a lawyer for criticism of Judge Peck's opinions. The bill which became the Act of March 2, 1831, was reported to the House by James Buchanan, Chairman of the Judiciary Committee, and Daniel Webster reported the same bill favorably from the Judiciary Committee of the Senate. The Act of 1831 greatly restricted the power of the courts to punish for contempt. This Act was discussed in *Ex parte Robinson*, 19 Wallace 505 (1873). In later years the power of the courts to punish for contempt has been still more restricted, particularly in labor cases. In the Clayton Act of October 15, 1914, 38 Stat. 730, 738, 740, Congress provided that in the special cases of criminal contempt coming "within the purview of that Act, the accused was entitled to a jury trial upon demand". In discussing the Clayton Act, the House Committee on the Judiciary said: (62nd Congress, 2nd Sess. House Report No. 613, Part 2, accompanying House Report 22591 p. 10)

> "That complaints have been made and irritation has arisen out of the trial of persons charged with contempt

in the Federal courts is a matter of general and common knowledge. The charge most commonly made is that the courts, under the equity power, have invaded the criminal domain, and under the guise of trials for contempt, have really convicted persons of the substantive crimes for which, if indicted, they would have had a constitutional right to be tried by jury. It has been the purpose of your Committee in this Bill to meet this complaint, believing it to be a sound public policy so to adjust the processes of the courts as to disarm any legitimate criticism; and your Committee confidently believes that so far from weakening the power and effectiveness of Federal Courts, this Bill will remove a cause of just complaint and promote that popular affection and respect which is in the last resolve the true support of every form of governmental activity."

In *Gompers* v. *United States*, 233 U. S. 604 (1914), involving proceedings which judged certain persons guilty of contempt in violating the terms of an injunction restraining them from continuing a boycott, this Court said in an opinion by Justice Holmes at page 610:

"These contempts are infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech. So truly are they crimes that it seems to be proved that in the early law they were punished only by the usual criminal procedure. * * * The English courts seem to think it wise, even when there is much seeming reason for the exercise of a summary power, to leave the punishment of this class of contempts to the regular and formal criminal process. *Matter of MacLeod*, 6 Jur. 461. Maintenance of their authority does not often make it really necessary for courts to exert their own power to punish, as is shown by the English practice in more violent days than these, and there is no more reason for prolonging the period of liability when they see fit to do so than in the case

where the same offence is proceeded against in the common way."

Third, to permit judges to summarily convict and imprison witnesses for perjury will seriously impede the administration of justice. If upon the complaint of a District Attorney, judges are to be clothed with the power the judge exercised in this case, witnesses will naturally be in fear that if they do not testify as the District Attorney obviously desires them to they will be adjudged in contempt of court, and sent to jail. The result will be that in many cases the witness' desire to tell the truth will be subordinated to his desire not to displease the District Attorney lest the latter bring him before the judge, charge him with perjury and have him imprisoned. If this condition of affairs is to be legalized, we will have a situation closely resembling the infamous trial by torture, which Blackstone so emphatically condemned in Vol. 4, page 326.

About a decade ago during a period of sensational "state trials" in Russia, in which self-incriminating confessions of treason were the prosecution's chief reliance, it was generally believed by those Americans who studied these trials that many innocent persons confessed to crimes which they never committed in order to save themselves and their families from mental and physical torture, or both. It is not unreasonable to believe that if witnesses who appear before grand juries know that a District Attorney, who does not get from them the testimony he desires, can report them to a judge as mendacious, and that the judge can then act as both judge and jury and send them to jail for contempt of court, such witnesses may be tempted to *depart from the truth in order not to incur the District Attorney's displeasure.* A witness who appears before a grand jury is alone, he has no counsel there to make objection or otherwise to protect his rights, and a District Attorney can and ordinarily does ask *leading* questions of

witnesses who appear before grand juries, and his zeal to obtain indictments sometimes overshadows his zeal to administer even-handed justice.

When a witness is sent to jail for allegedly giving false testimony before a grand jury that fact is publicized in the newspapers (as it was in this case) and the effect in creating fear in subsequent witnesses before the grand jury and a desire to give the District Attorney the kind of evidence he wants is obvious to anyone acquainted with human nature. Many persons when called before a grand jury as witnesses are having an experience that is entirely new to them. The grand jurors (especially in Federal courts) are in most cases total strangers to them. The District Attorney is also usually a stranger to the witness. The District Attorney is clothed with majesty and power as a representative of the government of the United States. He is usually a skilful lawyer and an adroit examiner and knows exactly what he wants. Nearly every witness in such a situation is nervous and apprehensive. If in addition to these factors just named, the witness is aware of the fact that if his testimony is not as the District Attorney desires it to be he may be sent to jail by the judge who has the grand jury in charge, the administration of justice is thus likely to be obstructed in a much more substantial manner and on a much larger scale than it ever can be by the false testimony of a single witness. The grand jury is under Anglo-Saxon and American law a valuable agency for the protection of innocence as well as for law enforcement, but it will become an instrument of oppression if the constitutional safeguards of the individual are to be judicially disregarded.

If what was done in this case is to receive the sanction of the highest court in the land, any Federal judge can also during the *trial* of any case, if he believes a witness is not telling the truth, declare a recess of the case on trial, put

the witness on trial before him without a jury, adjudge him guilty of contempt of court because of his alleged false swearing and sentence him to prison. The intimidating and "*obstructing*" effect such a summiary proceeding would have on other witnesses who are waiting to be called in that same case can easily be imagined. The inclination of such witnesses *under such circumstances* would naturally be to *conform* their testimony to what the district attorney and the trial judge wanted to hear. Only a witness who was both truthful *and resolute* would have the hardihood to tell a story on the witness stand which might incur the suspicion of either the district attorney or the trial judge as to its truthfulness. Neither a trial judge nor a district attorney can claim infallibility in determining whether or not a witness is telling the truth for sometimes "truth is stranger than fiction". Witnesses in testifying should be free of official or other intimidation so that the course of justice may be unobstructed.

In his argument in defense of the right to trial by jury in *Ex Parte Milligan*, 4 Wallace 2 (1866), Jeremiah S. Black said, *inter alia*, at page 65:

> . . . . It seems necessary, therefore, not only to make the judiciary as perfect as possible, but to give the citizen yet another shield against his government. To that end they could think of no better provision than a public trial before an impartial jury.
>
> "We do not assert that the jury trial is an infallible mode of ascertaining truth. Like everything human, it has its imperfections. We only say, that it is the best protection for innocence and the surest mode of punishing guilt that has yet been discovered. It has borne the test of a longer experience, and borne it better, than any other legal institution that ever existed among men.
>
> . . . . . .

"Those colonists of this country who came from the British Islands brought this institution with them, and they regarded it as the most precious part of their inheritance. The immigrants from other places where trial by jury did not exist became equally attached to it as soon as they understood what it was. There was no subject upon which all the inhabitants of the country were more perfectly unanimous than they were in their determination to maintain this great right unimpaired. * * *

"* * * They knew very well that no people could be free under a government which had the power to punish without restraint. Hamilton expressed in the Federalist, the universal sentiment of his time, when he said, that the arbitrary power of conviction and punishment for pretended offences, had been the great engine of despotism in all ages and all countries. The existence of such power is incompatible with freedom."

After quoting the constitutional guaranties of trial by jury (Art. 3, sec. 2 and Arts. 5 and 6 of the Bill of Rights) Attorney Black said at page 54:

"Is there any ambiguity there? If that does not signify that a jury trial shall be the exclusive and only means of ascertaining guilt in criminal cases, then I demand to know what words, or what collocation of words in the English language would have that effect? Does this mean that a fair, open, speedy, public trial by an impartial jury shall be given only to those persons against whom no special grudge is felt by the Attorney-General, or the judge-advocate, or the head of a department? * * * No; the words of the Constitution are all-embracing, 'as broad and general as the casing air.' The trial of ALL crimes shall be by jury. ALL persons accused shall enjoy that privilege —and no person shall be held to answer in any other way."

When this Court announced its decision in *Ex Parte Milligan*, 4 Wallace 2 (1866), it was unanimous in declaring

that the petitioner in that case, Lambdin P. Milligan, who had been found guilty on certain charges and specifications and sentenced to be hanged, by a military commission, had been deprived of his constitutional right to trial by jury and was entitled to be discharged from custody. In delivering the opinion of the Court, Justice Davis said at page 122:

> "Another guarantee of freedom was broken when Milligan was denied a trial by jury. The great minds of the country have differed on the correct interpretation to be given to various provisions of the Federal Constitution; and judicial decision has been often invoked to settle their true meaning; but until recently no one ever doubted that the right of trial by jury was fortified in the organic law against the power of attack. It is now assailed; but if ideas can be expressed in words, and language has any meaning, this right—one of the most valuable in a free country—is preserved to every one accused of crime who is not attached to the army, or navy, or militia in actual service. * * * This privilege is a vital principle, underlying the whole administration of original justice; it is not held by sufferance, and cannot be frittered away on any plea of state or political necessity. * * * these safeguards need, and should receive, the watchful care of those intrusted with the guardianship of the Constitution and laws. In no other way can we transmit to posterity unimpaired the blessings of liberty, consecrated by the sacrifices of the Revolution."

Counsel for this petitioner contend that when in *contempt* proceedings he was in effect adjudged guilty of the crime of perjury and sentenced to prison without a trial by jury he was denied a right guaranteed him and every other American citizen, by the Constitution of the United States. If witnesses testify falsely their guilt of perjury should be pronounced only after their indictment by a grand jury and after they are found guilty by the unanimous verdict of twelve trial jurors. Perjury is a *crime*, just as much as

larceny, or forgery, or assault and battery is a crime, and an individual charged with the crime of perjury cannot, unless the constitution is disregarded, be denied his right to a trial by jury by the simple expedient of calling perjury "contempt of court." One of the most precious rights guaranteed a citizen by the Constitution of the United States should *not* be held to be so chameleonic that the judicial recognition to be accorded it will depend upon a mere play on words in characterizing the acts of him who invokes it.

It is respectfully submitted that for the reasons stated and upon the authorities cited, as well as those contained in the brief accompanying the Petition for Writ of Certiorari, that the judgment of the lower court should be reversed.

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